STATE OF MICHIGAN
IN THE SUPREME COURT

TEDDY 23, LLC, a Michigan limited liability company, and MICHIGAN TAX CREDIT FINANCE, LLC, a Michigan limited liability company d/b/a MICHIGAN PRODUCTION CAPITAL,

Plaintiffs/Appellants,

v

MICHIGAN FILM OFFICE and MICHIGAN DEPARTMENT OF TREASURY,

Defendants/Appellees.

/

Supreme Court Docket No. 153420, 153421

Court of Appeals No. 323299, 323424

Lower Court No. 14-702-AA
Ingham County Circuit Court
Hon. Rosemarie E. Aquilina

Clifford W. Taylor (P21293)
Gregory A. Nowak (P39240)
MILLER CANFIELD PADDOCK & STONE, PLC
Attorneys for Plaintiffs/Appellants
150 West Jefferson Ave., Suite 2500
Detroit, MI 48226
(313) 496-7963

Jack L. Van Coevering (P40874)
FOSTER, SWIFT, COLLINS & SMITH, P.C
Attorney for Plaintiffs/Appellants
1700 East Beltline, N.E., Suite 200
Grand Rapids, MI 49525-7044
(616) 726-2221

Christina M. Grossi (P67482)
Joshua O. Booth (P53847)
Assistant Attorneys General
State Operations Division
Attorneys for the Michigan Film Office
PO Box 30754
Lansing, MI 48909
(517) 373-1162

Jessica A. McGivney (P64553)
Eric M. Jamison (P75721)
Assistant Attorneys General
Revenue & Collections Division
Attorneys for Department of Treasury
PO Box 30754
Lansing, MI 48909
(517) 373-3202

/

PLAINTIFFS/APPELLANTS TEDDY 23, LLC AND MICHIGAN PRODUCTION CAPITAL'S REPLY BRIEF TO APPELLEES' BRIEFS IN OPPOSITION TO APPLICATION FOR LEAVE TO APPEAL

TABLE OF CONTENTS

INDEX OF AUTHORITIES

PAGE

Cases

Statutes

INTRODUCTION

The Michigan Department of Treasury and the Michigan Film Office ("Appellees" or "Department" or "Film Office") have carefully avoided explaining to this Court how this case comes before it. Appellees' discussion relies on facts that were introduced on appeal, were never established below because of the lack of hearing and are inconsistent with Appellees own legal position. The facts bear summarizing so that the Court can fully appreciate the distortions contained in the briefs of the Department and Film Office.

This case concerns the denial of a Michigan film tax credit for a science fiction film to be called "Scar 23." After obtaining approval for a credit of $6,349,529 for expenditures related to the production of what may have been Michigan's first "CGI" (computer-generated imagery) film, and expending funds in excess of $10M in Michigan, the producers were unable to secure the total funding required to complete the film. As a result they discontinued the production and applied for a credit of approximately $4.3M for the $10,753,554 that had been expended. As required, Appellants engaged an independent certified public accountant (CPA) to audit the expenditures in order to request a post-production certificate. The CPA's sole contact as what records to examine, what records to maintain, and what inquiries to make was the Department's Investigator Clark-Pierson of the Michigan Department of Treasury. No one at the Film Office made any of these inquiries or provided any approval of the post-production certificate audit.

The request for a post-production certificate was submitted to both Appellees, with the documents that were discussed with Investigator Clark-Pierson and were retained at the direction of Investigator Clark-Pierson for her later review. Thereafter, all requests for additional documents and all review of those documents were made by, for, and through Investigator Pierson. Appellee Film Office did not request documents and had no known role in the audit of the post-production certificate request.

After working cooperatively with Investigator Clark-Pierson, for over 26 months, a letter was issued denying the credit in its entirely on June 20, 2013. The letter provided no explanation of the grounds on which the state had denied the application. Subsequently Appellants were provided a copy of a Department

memo detailing its post-production audit and its basis for the credit. Appellants were advised by Investigator Clark-Pierson that there was a 60 day period for appealing the denial, and a dialogue began regarding the basis for the denial of the credit. Appellants began developing supplemental information to satisfy the Department, specifically Investigator Clark-Pierson, so that the credit could be approved, and a first "extension" of the period was granted on August 16, 2013, the 57th day after the initial denial. There were two subsequent "extensions," on October 14, 2013 (59 days after August 16th) and on December 11, 2013 (58 days after October 14th).

None of the meetings during this time period involved any representative of the Film Office. All the meetings were set up by Investigator Clark-Pierson at the Treasury Building. All questions involving the documents, requests for additional information, indication of areas of concern were made exclusively by Investigator Clark-Pierson. No person from the Film Office was present. The Film Office never communicated with Appellants throughout this audit. In an email dated January 7, 2014, 27 days after this fourth "extension," the Investigator Clark-Pierson who had initially communicated the 60 day deadline stated:

> "On December 11, 2013, Film Commissioner Margaret O'Riley extended the appeal period on this matter by reissuing her letter disallowing the film credit for Teddy 23. That period expires on or about Monday February 10 based on my informal count of the 60 day period." Appellants' Br, Ex 19; email of Appellee-Department's Lead Investigator.

It was clear from this and other correspondence between the parties that the Appellants would appeal if the credit dispute could not be resolved administratively. In advance of the Department's presumptive deadline of February 10, 2014, Investigator Clark-Pierson scheduled a last meeting for January 29, 2014, 49 days after the final "extension," which was attended by Investigator Clark-Pierson, the Film Commissioner, and counsel for the state. Significant information as presented in a final effort to satisfy the state that the credit should be granted, but shortly after the January 29th meeting, the

Department and Film Office communicated that its position remained unchanged. Appellants filed Complaint in the Court of Claims, one week later.

Appellants filed in the Court of Claims within the 90 day period prescribed by MCL 205.22. Unexpectedly, Appellees claimed that this filing should have been initiated in the Circuit Court within **21** days of December 11, 2013. Appellants filed in the Circuit Court within the 6 month period for a delayed appeal. The Court of Claims dismissed Appellants' case without reaching any of the merits and the Circuit Court summarily denied leave to appeal without any explanation other than that Appellants could have filed "less late" within the 6 month delayed appeal period.

Appellants simply seek its basic due process right to a meaningful opportunity to be heard on the merits in some court. The Department and the Film Office have gone to extraordinary lengths in this case to see to deprive Appellants of that right.

I. WHETHER THE DEPARTMENT OR THE FILM OFFICE DENIED APPELLANTS' REQUEST FOR A POST-PRODUCTION CERTIFICATE AND THE FILM CREDIT IS A QUESTION OF FACT THAT REQUIRES AN EVIDENTIARY HEARING

Michigan law is clear that the record cannot be expanded on appeal. *Sherman v Sea Ray Boats*, 251 Mich App 41, 56; 649 NW2d 783 (2002) ("[t]his Court's review is limited to the record established by the trial court, and a party may not expand the record on appeal"). The appellate court is "bound to review the trial court's action on the record as certified to [the appellate court]." *Dora v Lesinski*, 351 Mich 579, 581; 88 NW2d 592 (1958). The Michigan Supreme Court held that even an affidavit from the trial judge is insufficient to allow for expansion of the record on appeal because "[c]ases in this Court must be disposed of on the record as made . . ." *Associates Discount Corp v Gear*, 334 Mich 360, 367; 54 NW2d 687 (1952).

Yet, the Department's entire presentation in its Answer in Opposition to the Application is exactly that: an expansion on appeal of contested facts. The Department claims that the Film Office conducted the audit of the post-production certificate request. Dep't Br, pp 5, 14. The Film Office independently

determined fraud. *Id.* at 8. The Department claims it rendered no "decision," and conducted no "audit" of post-production certificate request. *Id.* at 16, 20. The Department claims, including an affidavit (Department's COA Br, Ex. B) that it first provided to the Court of Appeals, that "Lenders counsel" advised Appellees of a 60-day appeal period. *Id.* at 7. The affidavit was not provided to any lower tribunal or court.

The support for all the Department's factual allegations are, however, supported by no documents presented to any trial court. Aside from the Department's affidavit submitted on appeal, the Department can provide no other evidence to support its claimed inaction, or conversely the Film Office's action, except *the Department's own audit report*. See the citations to the Department's audit report (Ex. 18 to Appellant's COA Br.), Dep't Br, pp 6-7, 16.

The Department's overriding and exclusive direction of the audit and its singular channel of communications with Appellants was not "ministerial assistance."

Likewise, the Department's brief provides no insight into its treatment of other film credit cases in which its actions *in determining the amount of the credit* were contested. It has indicated only that its prior actions are irrelevant because jurisdiction cannot be waived. (Dep't brief at pp 28-32.) The Department has failed to provide any meaningful discussion as to what action was taken, who took the action, what departmental processes actually exist for the administration of film credits, and why it took the actions. On this blank sheet, there is no examination of whether the Department's action was authorized under the film credit statute.

An agency's decision that violates a statute or constitution, is in excess of the statutory authority or jurisdiction of the agency, made upon unlawful procedures that result in material prejudice, or is arbitrary and capricious, is a decision that is *not* authorized by law and must be set aside. *City of Romulus v Dep't Envtl Quality*, 260 Mich App 54, 64; 678 NW2d 444 (2003). Whether the Department's assistance was ministerial or whether the Department simply borrowed the Film Office letterhead and stationary is a question of fact. Appellants are entitled to an evidentiary hearing.

II. APPELLANTS WERE DENIED PROCEDURAL DUE PROCESS BY THE ISSUANCE OF AN INSUFFICIENT AND MISLEADING NOTICE AND BY THE DEPARTMENT'S FAILURE TO ADVISE THEM OF ITS NEWLY ADOPTED JURISDICTIONAL INTERPRETATION AFTER IT LEARNED OF THE APPELLANTS' INTERPRETATION OF THE LAW

The Department and the Film Office would like to paint this case as a straightforward exercise in civil procedure. They make light of the constitutional questions presented by referring to them as "illusory" (Film Office brief p. 12) and argue that because the Court of Claims and Circuit Court failed to address them, the Court of Appeals properly ignored them (Dep't brief at 35.) and dismissed Appellants' other arguments as "red herrings" (Film Office brief p. 19, Dep't brief at 19.). They further disavow any representations of their representatives and assert that "a stray comment by a state employee" that cannot have due process implications. (Film Office brief, p. 23) But as illustrated above the facts here involve far more than a "stray comment." Indeed they reflect a systematic pattern of representing an appeal period of at least 60 days not only by express references to a 60 day appeal period but by the repeated "extensions" of that appeal period at 57, 59 and 58 day intervals. For the reasons fully discussed in Appellants Application, the notice provided by the state must be "reasonably calculated under all the circumstances" to inform the parties how to take advantage of the opportunity to be heard in order for notice to comport with due process was not provided here. *Mullane v Cent Hannover Bank & Trust Co*, 339 US 306, 314; 70 SCt 652; 94 L Ed 865 (1950). In *Mullane*, the United States Supreme Court explained that notice must reasonably convey the required appeal information and further instructed that, "[t]he means employed must be such as one desirous of actually informing . . . might reasonably adopt to accomplish it."[1] Both the United States and Michigan Supreme Courts have underscored that when a government learns of facts that notice was defective, the government must take extra steps indicative of someone actually desiring to correctly inform the parties. Failure to take this additional step is a denial of due process.[2]

---

[1] *Mullane*, 339 US at 314-315.

[2] *Jones v Flowers*, 547 US 220; 126 SCt 1708; 164 L Ed 2d 415 (2006); *In re Petition by Treasurer of Wayne Co for Foreclosure*, 478 Mich 1; 732 NW2d 458 (2007).

Appellees failed to provide any pre-deprivation hearing and provided a denial letter and three "extensions" at internals of 57, 59, and 58 days that all clearly were premised on an appeal period of not less than 60 days. The denial letters from the Film Commissioner all state that "any rights of appeal begin as of . . . the date of this notice." (Appellant Br, Ex 17.). The department itself stated "No filing deadlines or instructions as to where to file the appeals were ever provided." (Dept COA Br, p 26.)

The letters were also misleading since none of the denial letters stated that the time period for appeal would expire in 21 days from the date of the letter. Instead, *inconsistent with the 21 day time period,* the letters referenced a much longer appeal period supported by Appellees' practice of re-issuing denial letters, stating,

> This letter rescinds and replaces **the June 20, 2013 denial letter** sent to Mr. Campeau **and the August 16, 2013 denial letter** sent to Mr Campeau and [Mr. Bails]. Therefore, any rights of appeal begin as of October 14, 2013, the date of this notice. (Appellants' Br, Ex 17; Denial Letter of October 14, 2013.)

Appellees' silence regarding the exclusive 21-day period was knowing and intentional. The Department asserts that in an August, 2013 meeting "it was Teddy 23 and Lender's counsel that proclaimed that they had a 60-day appeal window to challenge the denial and intended to file suit in circuit court (Ex B.)." Dep't COA Br, p 27. As support, the Department attaches an affidavit from the Department's Lead Investigator, Sarah Clark-Pierson making this self-serving assertion. However, the Department had apparently determined a full year before the August, 2013 meeting with Appellants' attorney that the 21-day appeal period was the correct appeal standard. (Dep't COA Br, pp 24-25.) Nevertheless, while the same Department Lead Investigator Clark-Pierson attended the August, 2013 meeting and knew the 60-day was not the Department's appellate standard, she instead confirmed the wrong standard to Appellants in writing in the January 7, 2014 email referenced above.

For the reasons stated in their Application, the denial letters failed to meet the minimal standards of due process. The lack of notice requires that Appellants be given an initial hearing, whether that hearing is in the Court of Claims or in the Ingham Circuit Court.[3] Due process required Appellees to utilize procedural protections "*as the situation demands*, including fundamental fairness." *Thomas v Pogats*, 249 Mich App 718, 724; 644 NW2d 59 (2002) (emphasis added). When Appellees failed to correctly advise Appellants of their jurisdictional statement knowing that, from their new interpretation of the law, Appellants' had the wrong jurisdictional standard, and the ultimately asserted 21 day period had expired long before each of the 3 "extensions" of the denial and the January 29th meeting at which Appellants made one final attempt to reach an agreement without litigation, they failed to provide due process.[4] Whether the letters were deliberately misleading or whether the Department intentionally sought to mislead is a question of fact, requiring this Court to remand on that issue.

III. APPELLANTS ARE TAXPAYERS AND THE DENIAL OF THEIR FILM CREDIT AFFECTED THEIR PROPERTY INTEREST

MCL 205.22(1) provides for an appeal under the Revenue Act ("A taxpayer aggrieved by [a] . . . decision . . . of the department may appeal."). Appellants contend that "taxpayer" refers to a taxpayer under any of Michigan's taxes covered by the Revenue Act, regardless of whether the taxpayer is assessed or is denied a refund. They further contend that the Department has regarded and treated them as a taxpayer.

However, the Department and the Film Office argue that Teddy 23 and MPC are not "taxpayers" and have no property interest at stake that triggers procedural due process protection because they never

---

[3] *Mullane*, *supra*; *Alan v Wayne Co*, 388 Mich 210, 352; 200 NW2d 628 (1972); *Trussell v Decker*, 147 Mich App 312; 382 NW2d 778 (1985); *Latin Express Servs, Inc v Fla Dep't of Revenue*, 660 So 2d 1059 (Fla Dist Ct App, 1995); *Walters v Reno*, 145 F3d 1032, 1043-45 (CA 9, 1998); *Gonzalez v Sullivan*, 914 F 2d 1197 (CA 9, 1989); *Butland v Bowen*, 673 F Supp 638 (D Mass 1987); *Pickens v Shelton-Thompson*, 3 P3d 603, 608 (Mont 2000); *In re Lopez*, 192 BR 539, 544 (Bankr CA 9, 1996); *Bowden v Ward*, 27 SW3d 913, 917 (Tenn 2000) (relying on *Tulsa Prof Collection Servs, Inc v Pope*, 485 US 478; 108 SCt 1340; 99 LEd2d 565 (1988); *Covington v Dep't of Health & Human Servs*, 750 F2d 937, 943 (CA Fed, 1984).

[4] *Jones*, *supra*; *Treasurer of Wayne Co*, *supra*.

filed a return under the Michigan Business Tax Act ("MBT Act"). (Dep't Br, p 15.) From this erroneous legal basis, the Department reaches a remarkable conclusion: any person with no liability, as a result of the credit, is *not* a "taxpayer."

The Department's rationale ignores the bulk of the film credit provision, which refers to companies obtaining a credit but do not have a tax liability or whose credit exceeds their liability (i.e., a refundable credit) as "taxpayers." MCL 208.1455(8), for example, states,

> If the credit allowed under this section exceeds the tax liability of the company for the tax year or if the company claiming the credit does not have a tax liability under this act for the tax year, the department shall refund the excess or pay the amount of the credit. . . . The department shall . . . report to the governor . . . the total amount of the credits certified under this section that exceed the taxpayer's tax liability.

In the subsection 9, the statute permits the taxpayer to assign the refundable credit to "any assignee" and defines "taxpayer" to include assignees. See MCL 208.1455(9); MCL 208.1117(5)(b).[5]

Indeed, the statutory basis for the Department's specific denial of the credit to Appellants begins with the statement, "A *taxpayer* that willfully submits information under this section that *the taxpayer* knows to be fraudulent or false shall . . . be liable for a civil penalty equal to the amount of the taxpayer's credit under this section." MCL 208.1455(11). The Department's Lead Investigator determined that this section applied to Appellants as "taxpayers." See Appellants' COA Br, Ex 18.

The Department properly concluded that Appellants were taxpayers. They were aggrieved because the Department *concluded* they were taxpayers. Appellees' unsupported contradictory arguments to this Court lack merit. Appellants were taxpayers that were entitled to appeal under the Revenue Act.

---

[5] Likewise, the Department would invalidate section 30 of the Revenue Act, MCL 205.30, which gives the Department the option of crediting or refunding taxes to taxpayers irrespective of the tax acts under which the credits, liability, or refunds derive.

IV. THE DEPARTMENT FAILED TO FULFILL ITS STATUTORY DUTY UNDER THE TAXPAYER BILL OF RIGHTS BY FAILING TO EXPLAIN TAXPAYER PROTECTIONS WITH REGARD TO THE DEPARTMENTAL ACTION REGARDING THE FILM CREDIT OR THE MBT OR PROVIDING MISLEADING ADVICE REGARDING THOSE TAXPAYER PROTECTIONS

The Department argues that MCL 205.5, which mandates that the Department provide a brochure of a "taxpayer's protections and recourses" (the *Taxpayer Rights Handbook*) does not apply to the Department's actions in enforcing the film credit statute. (Dep't Br, p 21.) The Department does not dispute that the *Handbook* listed the MBT and, without exception, instructed that appellate recourse was in the Court of Claims. Appellants' COA Br, p 15 & Ex 22. The Department contends only that it did not issue an "assessment, decision or order" to which its notice obligations apply. (Dep't brief p 21.) That is, the Department does not dispute that MCL 205.5 applies to the Department, it just claims that it does not apply if the Department operates outside of its claimed statutory authority. The Department's distinction between not providing misleading notice and providing no notice at all is meaningless. Both result in a denial of due process.[6]

Notably, MCL 205.5 requires the Department to "prepare a brochure that lists and explains, in simple and nontechnical terms, a taxpayer's protections and recourses in regard to a departmental action administering or enforcing a tax statute." This section requires publication of a "taxpayer's protections" required in response to any "departmental action." It specifies that this action is not just to an assessment of final decision but the entire pre-assessment process beginning with an "audit." MCL 205.5(1)(a). The audit in this and other film credit cases, entirely conducted by the Department, was subject to the notification procedures in MCL 205.5.

As this Court and the Michigan Supreme Court have found, the Department's attempts to ignore or narrowly apply mandated taxpayer protections contained in the Taxpayer Bill of Rights defeat the Legislature's purpose. *Fradco Inc v Dep't of Treasury*, 495 Mich 104; 845 NW2d 81 (2014) (rejecting the

---

[6] *Butland*, *supra*. See also *Covington*, *supra*; *Jones*, *supra*; *Treasurer of Wayne Co*, *supra*.

Department's interpretation that the requirement in MCL 205.8b to provide notice to a taxpayer's attorney was optional); *Alan*, *supra*. The notice envisioned in MCL 205.5 was part of the procedural process due to Appellants.[7] Treasury seeks to limit this Court's decision in *Fradco*, but this Court recognized that the Taxpayer Bill of Rights had a more fundamental due process underpinning regarding the adequacy of notices where a Department action is involved. *Fradco*, *supra*; *Mullane*, *supra*.

CONCLUSION AND RELIEF REQUESTED

For these reasons stated herein and in Appellants Application for Leave to Appeal, Appellants respectfully request that this Court enter an order reversing the decisions of the circuit court or order of the court of claims, remand this matter for a hearing, and/or, remand this matter to develop the appropriate evidentiary record to evaluate Appellant's claims.

Respectfully submitted,

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

By: /s/ Gregory A. Nowak
Clifford W. Taylor (P21293)
Gregory A. Nowak (P39240)
150 West Jefferson, Suite 2500
Detroit, Michigan 48226
(313) 963-6420

By: FOSTER, SWIFT, COLLINS & SMITH, P.C.
Jack L. Van Coevering (P40874)
1700 East Beltline, N.E., Suite 200
Grand Rapids, MI 49525-7044
(616) 726-2221

Dated: May 12, 2016
26769214.2\144366-00006

[7] See the cases cited in footnotes 2 and 3 of this brief.